IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6522 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-
And
HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SANGHANI BRIGHT STEEL MANUFACTURERS
Versus
UNION OF INDIA THR'SECRETARY

Appearance:
1. Special Civil Application No. 6522 of 2005
MR DHAVAL SHAH for Petitioner No. 1-2
MR JITENDRA MALKAN for Respondent No. 1
NOTICE SERVED BY DS for Respondent No. 1,2-3

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 06/05/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1 This petition under Article 226 of the Constitution of India challenges order No.M-73/WZB/05/C-IV dated 24.02.2005 passed by The Customs, Excise And Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (CESTAT) (Annexure-H). The facts in nutshell leading to the controversy are :

2 The petitioner, a partnership firm was called upon to discharge duty demand of a sum of Rs.11,77,068/- vide Order-In-Original No. 987/Modvat/1997 dated 19.12.1997. The petitioner carried the matter in appeal before the Commissioner (Appeals), Rajkot who vide Order-In-Appeal No.1073/2001/Commr(A)/Raj dated 29.11.2001 allowed the appeal. Being aggrieved by the order of the Commissioner (Appeals) the Central Excise Department filed an appeal before CESTAT.

3 It is the say of the petitioner that under letter F.No.AR-IV/Sanghani Steel/Rec/04-05 dated 27.10.2004 respondent No.3 called upon the petitioner to discharge the liability as CESTAT had passed its order dated 5.3.2004 bearing No.C-III/1007/WZB/04 allowing the departmental appeal.

4 On receipt of the aforesaid letter and copy of the order of CESTAT the petitioner moved an application being Misc. Application seeking restoration of the appeal on 2.11.2004. During the pendency of the said Misc. Application the petitioner filed Special Civil Application No. 14970 of 2003 before this Court seeking direction to the respondent authorities against coercive recovery. Alternative prayer was that CESTAT may be directed to hear and decide the petitioner's Misc. Application dated 2.11.2004.

5 On 30.11.2004 this Court passed an order in the aforesaid petition by holding that :

"The interest of justice would be served by directing the learned CESTAT to hear and decide the application dated 2.11.2004 (Annexure-D) submitted by the petitioners to the learned CESTAT for recalling its order as early as possible. Accordingly, learned CESTAT is directed to decide the application dated 2.11.2004 for recalling the order passed in appeal as early as possible and not later than 31.1.2005 after hearing the learned counsel for

the parties. At the first instance, both the parties shall appear before the learned CESTAT on 14.12.2004 and on that day, the learned CESTAT will give the date of hearing to the parties and after hearing the parties, it shall decide the application dated 2.11.2004 (Annexure-D) as early as possible and not later than 31.1.2005, as directed hereinabove. Rule is made absolute to the aforesaid extent".

6 It is the say of the petitioner that as directed by this Court they appeared before CESTAT on 14.12.2004 and the hearing was fixed on 27.01.2005. As the application for restoration was based on the statement of the petitioner that it was not in receipt of the notice of hearing issued by CESTAT, CESTAT directed its Registry to verify and report on this aspect of the matter on the next date of hearing viz. 24.02.2005.

7 On 22.02.2005 the Advocate for the petitioner addressed a letter to CESTAT requesting for adjournment on the ground of his illness and in the application it was stated that he was under medical advice not to travel.

8 CESTAT has passed an exparte order on 24.04.2005 and while doing so has observed as under :

"I find that since the restoration application seeks Restoration of Appeal whereas the appeal was filed by the Department and it was allowed in its favour and there is no case for dismissal of the appeal, the restoration application is not maintainable. Besides, the applicant is also absent despite notice. I, therefore, dismiss the application for restoration of appeal for the above reasons. It is pertinent to mention that the Hon'ble High Court of Gujarat as per the Order dated 30.11.2004 in Special Civil Application No.14970/2004 have inter alia directed to decide the restoration application not later than 31.01.2005. Therefore, in view of the directions of the Hon'ble High Court, I do not find any justification for the applicant to seek adjournment. The adjournment application is also dismissed".

9 Heard Mr.Dhaval K.Shah, learned Advocate for the petitioner and Mr.Jitendra Malkan, learned Counsel for

the respondent. In light of the controversy between the parties, which lies in a very narrow compass and the view that the Court is inclined to take, the matter is taken up for hearing and disposal today with the consent of the learned Counsels. RULE. Mr.Malkan waives service of Rule.

10. It is submitted by Mr.Shah that CESTAT has committed an error in law in not granting adjournment as prayed for and rejecting the application for restoration. He therefore urged that the said order be quashed and set aside and the Restoration Application be restored to the file of CESTAT directing CESTAT to hear the parties on the Restoration Application.

11 Mr.Malkan on behalf of the respondent authorities submitted that there was no error committed by CESTAT in light of Rule 21 of Customs Excise And Service Tax Appellate Tribunal (Procedure) Rules,1982 (the Rules) with special reference to Proviso under Rule 20 of the Rules. It was submitted that as rightly held by CESTAT the appeal before the CESTAT was a departmental appeal and the petitioner, as respondent had no right to seek restoration of the appeal which was decided exparte in absence of the respondent. He therefore submitted that no interference was called for and the petition be rejected.

12 Impugned order dated 24.2.2005 made by CESTAT cannot be permitted to stand for the reasons that follow hereinafter.

13 CESTAT has lost sight of the fact that it was not called upon to hear and decide the Restoration Application simpliciter on the basis of its procedural Rules but the same was also required to be heard and decided in light of the directions made by this Court. As already noticed hereinbefore this Court had categorically directed CESTAT to decide application dated 2.11.2004 for recalling the order passed in appeal after hearing learned Counsels for the parties. Thus, CESTAT was duty bound to hear the counsels for the parties and when counsel of one of the parties had requested for adjournment on the ground of his personal illness CESTAT could not have rejected the application for adjournment on the specious ground that it was required to dispose of the Restoration Application before 31.01.2005, when in fact CESTAT itself had fixed up the hearing on 24.02.2005. It is nobody's case that application for adjournment had not been received or was found to be incorrect or untrue in any respect. Therefore, on this

limited count the impugned order is liable to be set aside.

14 However, it is also necessary to consider other reasons and findings by CESTAT viz. as to whether the Restoration Application was or was not maintainable. Though, CESTAT has not referred to any specific provision it appears that it was guided by a conjoint reading of rule 20 and 21 of the Rules for the purpose of arriving at a decision that Restoration Application was not maintainable. In this context it is necessary to reproduce rule 20 & 21 of the Rules which read as under:

"RULE 20. Action on appeal for appellant's default. - Where on the day fixed for the hearing of the appeal or on any other day to which such hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion , either dismiss the appeal for default or hear and decide it on merits :

Provided that where an appeal has been dismissed for default and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the dismissal and restore the appeal.

RULE 21. Hearing of appeals ex parte.- Whereon the day fixed for the hearing of the appeal or on any other day to which the hearing is adjourned the appellant appears and the respondent does not appear when the appeal is called on for hearing, the Tribunal may hear and decide the appeal ex parte".

15 On a plain reading at first blush, the interpretation adopted by CESTAT may appear to be correct. Rule 20 of the Rules states that on the day fixed for the hearing of the appeal in case of non appearance on behalf of the appellant CESTAT is entitled in its discretion either to dismiss the appeal for default or hear and decide it on merits. Under the Proviso it is laid down that in case where the appeal is dismissed for default and the appellant appears afterwards and makes out sufficient cause for non appearance CESTAT shall make an order setting aside the exparte dismissal and restore the appeal.

16 Rule 21 of the Rules provides for hearing of appeal exparte in a case where the appellant appears and the respondent does not appear when the appeal is called out for hearing. Under the said rule, CESTAT is entitled to exercise its discretion, i.e. it may hear and decide the appeal exparte. Thus, it may appear that restoration of an appeal is only permissible at the behest of the appellant and not at the instance of the respondent when the appeal is decided exparte. However, such narrow and pedantic view cannot be accepted. It is necessary for CESTAT to bear in mind that under main provisions of the Central Excise Act,1944,(the Act), it is empowered to hear and decide the appeal so as to finally adjudicate upon the rights of the parties viz. assessee and the department for the purpose of ascertainment of liability to duty or otherwise under the Act. Any decision which affects the rights of the parties, especially of an assessee, where the assessee is ultimately going to be called upon to pay duty has to take within its fold the principles of natural justice. In other words a party which is liable to be affected by the final outcome is required to be granted an opportunity of proper and reasonable hearing in accordance with law.

17 It is this fundamental principle which forms the basis of Rule 18 of the Rules. The said rule provides for date and place of hearing. Under sub-rule (1) of Rule 18 of the Rules it is provided that CESTAT shall notify the date and place of hearing of the appeal and/or application to the parties. Sub-rule (2) of Rule 18 of the Rules states that the issue of the notice referred to in sub-rule (1) shall not by itself be deemed to mean that the appeal or application has been admitted. Therefore, when rule 18 is read as a whole it envisages not only any notification of hearing on the notice board of CESTAT but issuance and service of individual notice to the party. Therefore, even under the Rules, it becomes necessary for CESTAT to ensure that proper notice, as may be prescribed, is issued and served on the parties. This would also take within its fold adequate notice. In other words notice should ensure that adequate time is available for either of the parties to make proper arrangement to appear and represent its case.

18 In the present case, principal grievance of the petitioner was and even exists today, that the petitioner was never served with notice of hearing of the appeal, and hence application for restoration. In the petition, the petitioner has specifically averred that on the earlier date of hearing viz. 27.01.2005, after hearing

the parties CESTAT had directed its Registry to verify whether notice of hearing of the departmental appeal had been served upon respondent viz. petitioner or not and in this context the hearing had been adjourned to 24.2.2005. This fact is also averred in the application for restoration and is duly supported by affidavit of partner of the petitioner sworn on 2.11.2004. In these circumstances, CESTAT could not have proceeded on the basis of Rule 21 of the Rules because even if the interpretation sought to be placed by CESTAT may be accepted for the sake of argument, it would yet require that the facts and the record establish that notice of hearing envisaged under rule 18 was duly served on the respondent. Only then and then it could be stated that the respondent had committed a default and was required to bear the consequences by way of appeal being decided exparte. Therefore, CESTAT was duty bound to await till the verification of its own record was complete.

19 Considering the issue from a slightly different angle it is necessary to take into consideration the provisions of Section 35C(2) of the Act. The said section permits CESTAT to amend any order made by it under Section 35C(1) of the Act with a view to rectify any mistake apparent from the record within the period of limitation if the mistake is brought to its notice by either party. Therefore, an order which was made deciding the departmental appeal exparte can be said to suffer from a legal infirmity viz. non compliance with rule 18 of the Rules and was thus amenable to rectification as the order suffered from a mistake apparent on the record. In fact as averred by the petitioner, the hearing was adjourned to 27.01.2005 by CESTAT with a view to ascertain as to whether the record of CESTAT reflected any such mistake. Without the said exercise of verification being complete, CESTAT could not have passed the impugned order on 24.04.2005. In case record revealed otherwise it was incumbent upon CESTAT to ensure that the said aspect gets reflected in its order. In absence of the same one has to proceed on the presumption that the averments made by the petitioner in the petition and the application for restoration duly supported by affidavit, have gone unchallenged.

20 Before parting, it is necessary to reiterate the settled legal position. "The procedural law is always to be construed and applied in a manner so as to make it a hand-maid to the cause of justice, and it cannot be treated as a substantive provision so as to defeat the rights of the parties". (Ref :Billimora Engineering Mart vs. Commissioner of Income Tax, (1985) 156 ITR 153).

21 In the result, impugned order dated 24.02.2005 made by CESTAT in Application No.E/ROA/2723/04-Mum in Appeal No.E/827/02-Mum is hereby quashed and set aside and the application for restoration stands revived on the file of CESTAT.

22 CESTAT is hereby directed to hear the parties and thereafter pass an order in accordance with law. In the first instance the parties shall appear before CESTAT on 23.05.2005 so as to enable CESTAT to fix up the date of hearing in accordance with its own calendar.

23 The petition is accordingly allowed. Rule made absolute. There shall be no order as to costs.

(D.A.Mehta, J)

(H.N.Devani, J)

m.m.bhatt